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Report of the Working Party on the
**Expenses of Legal
Proceedings against
Justices and Clerks**



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Working Party on the Expenses of Legal Proceedings against Justices and Clerks

REPORT

*To the Rt. Hon. R. A. Butler, C.H., M.P.,
Her Majesty's Principal Secretary of State for the Home Department,
and the Rt. Hon. the Viscount Kilmuir, G.C.V.O.,
Lord High Chancellor of Great Britain.*

1. We were appointed in October 1959 " to consider the present arrangements for meeting out of public funds

(a) expenses incurred by justices of the peace, clerks of the peace, or clerks to justices, in connection with legal proceedings brought against them, in respect of acts done or words spoken by them in the execution of their duties;

(b) costs or damages awarded against justices of the peace, clerks of the peace, or clerks to justices, in any such proceedings,
and to report what, if any, alterations are desirable in the public interest."

2. There is much obscurity as to the circumstances in which justices and clerks could be made liable in legal proceedings in respect of their actions in their official capacity. The question of amending the law governing the legal liability of justices and clerks in respect of their official actions was not, however, within our terms of reference, and our enquiry was confined to an examination of the situation existing when proceedings are in fact brought against a justice or a clerk. The two questions with which we were mainly concerned were, first, whether the law as it stands at present is wide enough to provide for the payment out of public funds of the expenses of legal proceedings, and of any sums awarded as costs or damages, in all cases where this is desirable and justifiable in the public interest, and secondly, whether the machinery set up by the existing statutory provisions is best for the purpose.

3. We think that changes are desirable under both heads. Although such cases are no doubt rare, their consequences may be extremely serious for the justice or clerk concerned, causing him considerable anxiety and involving him in financial loss. We consider therefore that action to ensure that he is properly indemnified in such proceedings is amply justified.

Existing position

4. The existing statutory provisions for meeting out of public funds expenses incurred by a justice in respect of acts done out of Quarter Sessions are contained in sections 25 and 26 of the Justices of the Peace Act, 1949. Provision for the payment out of county funds of costs incurred by a justice of the peace for a county in respect of acts done in Quarter Sessions is made by section 66 of the Local Government Act, 1888. These provisions are set out in the Appendix to this Report.

There are no provisions dealing with actions against clerks to justices or against Recorders or against clerks of the peace of either counties or boroughs.

5. The existing position may be summarised as follows:

- (a) *Acts done out of Quarter Sessions by Justices of the Peace:* By virtue of section 25(2)(c) of the Act of 1949, a Magistrates' Courts Committee may authorise the payment out of local funds of costs incurred by a justice in defending any legal proceedings taken against him in respect of any order made or act done in the execution of his duty. Under section 25(2)(d) of the Act the Magistrates' Courts Committee may authorise the payment out of local funds of any costs or damages awarded against a justice in such proceedings, in so far as they determine that they ought not to be borne by the justice personally. Section 26(3) provides for an appeal by a county or county borough council to the Secretary of State against the determination of a Magistrates' Courts Committee under section 25(2)(d); there is apparently no similar right of appeal against the decision of a Magistrates' Courts Committee to authorise payment of a justice's own costs under section 25(2)(c).
- (b) *Acts done in County Quarter Sessions:* Any costs incurred by a justice of the peace for a county in defending any legal proceedings taken against him in respect of any order made, or act done, in the execution of his duty, may, by virtue of section 66 of the Local Government Act, 1888, be paid out of county funds at the discretion of the Standing Joint Committee. There is no provision for appeal by the County Council. There is no statutory provision corresponding to section 25(2)(d) of the Justices of the Peace Act, 1949, for the payment out of local funds of costs or damages awarded against a justice in legal proceedings arising out of acts done in Quarter Sessions.

6. We consider that these provisions are plainly inadequate and are unsatisfactory for a number of reasons. Our principal criticisms are—

- (a) the provisions cover only a limited number of the persons who ought to be covered;
- (b) they do not cover all the circumstances which ought to be covered, e.g. there is no provision for settlement of an action, or for payment of costs or damages awarded against a justice sitting in Quarter Sessions;
- (c) they give the individual justice no recourse to any higher authority if the Magistrates' Courts Committee, who have a completely open discretion, decide against him.

Persons covered by recommendations

7. We considered that any recommendations which we might make as to the provision for indemnification must cover lay justices and stipendiary magistrates, chairmen and deputy chairmen of Quarter Sessions, whether paid or unpaid, and persons acting as such, Recorders, deputy and assistant Recorders, clerks and deputy clerks of the peace and clerks to justices, and where in the following

paragraphs we refer to justices and clerks we must be understood, unless the contrary is specified, to include all these persons. We also considered that it was not our function to recommend special provisions to deal with special circumstances which exist in the case of certain courts such as the Liverpool and Manchester Crown Courts and the Metropolitan Magistrates' Courts, though we are aware that they may require some adaptation of our recommendations.

Principles governing indemnity

8. We consider that provision should be made under which it would be possible to meet from public funds any expense arising out of actions brought against justices or clerks in respect of anything done in good faith and reasonably in the course of their duties. We do not consider it necessary or desirable to make any distinction between judicial and administrative acts for this purpose. Nor do we consider that a justice should necessarily be deprived of indemnity in respect of an act which is held to be outside his jurisdiction.

9. The principle which we recommend, and which we think would be generally acceptable, is that any justice and any clerk who has acted in good faith and reasonably in the course of the duties attaching to his office, and is as a result involved in legal proceedings, should be entitled to look to public funds for payment of the expenses involved.

10. We consider that this indemnity should be for the reasonable costs of defending an action and for taxed costs or damages awarded against a justice or clerk. It is impracticable to define precisely what should be regarded as 'reasonable' costs; these would not necessarily be the same as the actual costs taxed on a 'solicitor and own client' basis or the costs that the High Court would allow on a 'party and party' basis. 'Reasonable' costs in our view are those which would be necessary for a proper and adequate but not extravagant defence. Any payments made in settlement of an action should similarly be met to the extent of what is 'reasonable'. A settlement made on the advice of Defence Counsel should normally be accepted as reasonable without question, but in the exceptional case where the local authority responsible for payment is not satisfied with the terms of a proposed settlement the authority should be able to require confirmation by Leading Counsel that the terms of the settlement are reasonable.

Machinery for determining question of indemnity

11. We have considered at some length the most suitable machinery for giving effect to the principles governing indemnity which have been suggested in paragraphs 8 to 10. It was suggested during our discussions that the question whether a justice or clerk against whom proceedings had been brought should have his expenses and any costs awarded against him paid from public funds might be decided by the High Court when the case was heard. Such expenses and costs might be paid automatically from public funds unless the judge ruled to the contrary. The advantage of such a scheme is that it would obviate the need for elaborate provisions for consulting the local authority and for appeal by the local authority or the justice or clerk concerned against an initial decision with regard to indemnification. There would appear however to be serious difficulties in the way of this proposal. In order to reach a decision

on the question of payment of expenses it might be necessary for the court to take account of considerations quite remote from the matters before it when judging the principal issue. The court would presumably have to bear parties (e.g. the local authority) who had not been involved in the main proceedings. Different machinery would be necessary if the case were settled out of court. Moreover, although cases were likely to be infrequent, we were reluctant to suggest that new responsibilities, possibly entailing the expenditure of considerable additional time on a case, should be placed on the courts. We therefore did not pursue this suggestion.

12. Although we think that in future the law should provide that a person who has acted in good faith and reasonably should have his expenses paid, some authority must take the decision whether the case comes within these provisions. It is desirable that the authority responsible for taking the initial decision should, as at present, be in a position to decide in advance of the court proceedings whether the expenses incurred by a justice or clerk should be defrayed from public funds. It will not always be possible to decide in advance of the proceedings to what extent any costs or damages awarded by a court against a justice or clerk should be paid from public funds, but where it is proposed to settle the matter out of court the machinery should be such that a decision can be reached in advance of the settlement. We consider that in the case of justices acting out of Quarter Sessions, and their clerks, the initial determination should be made locally by a body which is in close touch with events and in a position to reach a speedy decision. In our view the most appropriate body for this purpose is clearly the Magistrates' Courts Committee and we recommend that the decision should remain with them.

13. At present there is no provision for appeal by an individual who is dissatisfied with a decision of a Magistrates' Courts Committee. We do not know of any cases in which this had led to hardship or injustice in the past. We understand, however, that some anxiety exists on this score and that justices and clerks would feel reassured if there were a right of appeal from the decision of a Magistrates' Courts Committee. We accordingly recommend that provision should be made for such appeals.

14. We consider that the local authority should also have a right of appeal against a decision of a Magistrates' Courts Committee, both as to the merits of the decision to indemnify a justice or clerk and on the quantum of the amount involved and that it should apply both to the costs incurred by the justice or clerk and to the payment of any costs or damages awarded against him. It would also be logical for the local authority to have a right to be heard in any appeal by a justice or clerk against a decision of the Magistrates' Courts Committee (see paragraph 13)—though we should hope that this would be very rarely exercised.

15. We have considered what machinery would be most appropriate for dealing with the appeals referred to in paragraphs 13 and 14. The Secretary of State is at present responsible for determining appeals by the local authority under section 26(3) of the Justices of the Peace Act, 1949, in respect of the administrative matters referred to in section 26(1) of the Act and since he is the Minister responsible for the payment of Exchequer grant to authorities responsible for meeting the costs of magistrates' courts it is appropriate that he should have such power. It appeared to us, however, that appeals on the question of costs and damages in legal proceedings fall into a different category

and that they have the character of a judicial rather than an administrative proceeding. We suggest, therefore, that when occasion arises the Lord Chancellor should appoint a suitable person to deal with a particular appeal. His decision would be final. In the case of an appeal on what constitutes reasonable costs an authority with the requisite experience and technical knowledge of the taxation of costs is required. It is desirable therefore that the person appointed by the Lord Chancellor to deal with appeals on quantum should be a taxing-master or someone with similar qualifications.

16. We have considered whether it is necessary to deal with the cost of a justice or clerk being represented in an appeal to the appeal authority appointed by the Lord Chancellor, against an initial refusal by the Magistrates' Courts Committee to indemnify him, or in an appeal by the local authority. In our view such representation is unnecessary, since appeals should normally be settled on the basis of written submissions, without an oral hearing.

17. If a justice or clerk is indemnified in respect of legal proceedings taken against him, and on the conclusion of the proceedings wishes to appeal against an adverse judgment of the court, the question whether he should be indemnified in respect of the further costs of such an appeal should be determined *de novo* in the same manner as in the initial proceedings. In general, we think that a justice or clerk should be indemnified in appeal proceedings only if some important point of principle is at issue; he should not expect indemnification in civil actions automatically to be extended to appeal proceedings.

Quarter Sessions

18. The principles governing indemnification which we have stated should apply to Quarter Sessions as well as to justices acting out of sessions and their clerks. The machinery must, however, of necessity be different. The Magistrates' Courts Committee has no standing in regard to Quarter Sessions. In our opinion the Standing Joint Committee is not an appropriate body to decide the question of indemnity in the case of legal proceedings arising out of acts of Quarter Sessions; there is in any event no similar body which could act in the case of Borough Quarter Sessions. We came to the conclusion that it was preferable that Recorders, deputy and assistant Recorders, and chairmen and deputy chairmen of Quarter Sessions and persons acting as such, should be treated in this matter in the same way as are, we are informed, Judges of the High Court and County Court Judges (which indeed many of the chairmen are). This means that a Recorder, chairman or deputy chairman against whom legal proceedings are brought would communicate direct with the Lord Chancellor, who, if he considered the case suitable, would ask the Treasury Solicitor to take over the conduct of the defence. If this is accepted, it seems necessary for practical reasons that the arrangements for indemnifying lay justices in cases arising out of their actions at Quarter Sessions should be the same as for the chairmen and deputy chairmen since they will normally be sitting with them and the actions would not be separable. Nor do we consider it possible to separate Quarter Sessions in its judicial and administrative capacities. We accordingly recommend that the procedure suggested in this paragraph should also apply to justices in Quarter Sessions in respect of both judicial and administrative acts, and to clerks and deputy clerks of the peace. Past experience leads us to believe that cases of this kind are likely to be rare.

19. The question arises, who should be responsible for defraying any expenditure in cases where the arrangements suggested in the preceding paragraph are adopted. The Treasury Solicitor's own expenses would of course be met out of Exchequer funds. A justice or clerk of the peace for whom the Treasury Solicitor is acting should not himself incur any costs; costs or damages might, however, be awarded against him or a settlement might be made out of court. If such expenditure were borne locally it would be reasonable that the views of the local authority responsible for payment should be taken into account on the conduct of proceedings, etc. These cases should be infrequent, however, and the expenditure incurred very small, and in order to avoid the difficulty of having to devise complicated machinery for consultation we suggest that the liability might be accepted by the Exchequer.

Proceedings in the Divisional Court and appeals against decisions

20. In our recommendations so far we have had in mind personal actions against one or more justices or a clerk. Where proceedings are not of this kind different considerations apply. We have considered (i) appeals to Quarter Sessions, (ii) statement of a case to the Divisional Court and (iii) motions for a prerogative order.

21. While justices have a locus standi in an appeal to Quarter Sessions there is no obligation on them to support a conviction. If they appear they do not make themselves a party to the appeal and therefore no order can be made against them in respect of costs. We decided that such proceedings did not come within our terms of reference as they are not brought against the justices and this applies generally to all appeal proceedings in the ordinary sense.

22. Justices who state a case are apparently not liable for any costs in respect of such proceedings. It appears that they might be ordered to pay the cost of restatement of a case wilfully stated erroneously, and that costs might, in certain circumstances, be awarded against justices who disregarded a High Court order to state a case. We do not consider, however, that any costs are likely to arise out of an application for a case to be stated where the circumstances are such that a justice might reasonably expect to be indemnified.

23. Where a justice is a respondent in proceedings in the Divisional Court for the issue of a prerogative order it should normally be sufficient for him to file an affidavit. Section 2 of the Review of Justices' Decisions Act, 1872, provides that whenever the decision of any justice is called in question in any superior court of common law, it shall be lawful for any justice to file an affidavit setting forth the grounds of the decision and any facts which he may consider to have a material bearing upon the question at issue, without being required to pay any fee in respect of filing such affidavit. In *R. v. Llanidloes Licensing Justices ex parte Davies* (1957) 2 All E.R. 610, where the Divisional Court granted an order of mandamus, Lord Goddard stated, in awarding costs against the justices, that the legislature has given justices this opportunity of putting their views before the court without being liable for costs and that normally they should avail themselves of the Act; he pointed out that by instructing counsel to argue the case they make themselves parties to the proceedings and costs may be awarded against them.

24. In exceptional cases the Divisional Court may wish the justices to be represented in order that they may hear the case argued. Arrangements are in

force in the Metropolitan Magistrates' Courts Area for metropolitan magistrates to be represented in the Divisional Court in the cases where it is appropriate and there have been some extensions of the practice to lay justices sitting, for example, in the Metropolitan Juvenile Courts. The practice is for application to be made to the Secretary of State for consideration whether the Treasury Solicitor should be asked to instruct counsel to appear. Where counsel is instructed he usually appears and argues the case as '*amicus curiae*'.

25. In the circumstances we consider that it is necessary to make provision for costs and expenses in proceedings in the Divisional Court on a motion for a prerogative order, only where the Divisional Court has given some indication that it is desirable that the justices should be represented. The governing principle should be that the purpose of representation of the justices is to assist the Divisional Court; where the Court do not ask for representation it should be sufficient for the justices to file an affidavit. Responsibility for preparing and filing the affidavit should remain with the justices and the clerk. In the infrequent cases where the Divisional Court have asked for the justices to be represented, we suggest that if the justices wish for representation at public expense the Treasury Solicitor should instruct counsel to appear and argue the case as he does in the circumstances referred to in the preceding paragraph. Arrangements could no doubt be made for him to be supplied in such cases with the affidavit filed by the justices.

26. In the Administration of Justice Bill, at present before Parliament, ⁽¹⁾ provision is made for appeal to the House of Lords from decisions of the Divisional Court in criminal matters. Presumably the justices concerned will normally be expected to be represented in such proceedings. We suggest that the Treasury Solicitor should also make the necessary arrangements in these cases if the justices so desire.

Summary of Recommendations

27. (1) A lay justice or stipendiary magistrate, a chairman or deputy chairman of Quarter Sessions or person acting as such, a Recorder, deputy or assistant Recorder, clerk or deputy clerk of the peace or clerk to justices who is a defendant in proceedings (otherwise than as a party to proceedings in the Divisional Court) should be entitled to be indemnified for any act done in good faith and reasonably in the execution or intended execution of his duties. No distinction should be made between judicial and administrative acts.
- (2) Payment out of public funds should be for the reasonable costs necessary for a proper and adequate but not extravagant defence and for any taxed costs or damages awarded against a justice or clerk, or for any reasonable amount paid in settlement of an action.
- (3) The initial decision whether, in a particular case, such payments should be made to justices acting out of Quarter Sessions and their clerks should be taken by the Magistrates' Courts Committee.
- (4) A justice or clerk who is dissatisfied with the decision of a Magistrates' Courts Committee should have a right of appeal to an appeal authority appointed by the Lord Chancellor.

(1) Now the Administration of Justice Act, 1960

- (5) The local authority out of whose funds the expenditure would be defrayed should also have a right of appeal to an authority appointed by the Lord Chancellor, against a decision of a Magistrates' Courts Committee that a justice or clerk should receive payment out of local funds to meet the costs of defending an action or any costs or damages awarded against him. The grounds of the appeal should include both the merits of the decision to indemnify and the quantum of the costs in respect of which indemnity is to be granted. The local authority should also have a right to be heard in any appeal by a justice or clerk against a decision of a Magistrates' Courts Committee.
- (6) Appeals to the authority appointed by the Lord Chancellor should normally be settled on the basis of written submissions, without an oral hearing.
- (7) A justice or clerk who wishes to appeal to a higher court against an adverse judgment in legal proceedings taken against him should normally be indemnified for the costs of the appeal only if it is considered that the appeal is justified because an important point of principle is at stake.
- (8) Where legal proceedings are taken against a Recorder, deputy or assistant Recorder, a chairman or deputy chairman of a Quarter Sessions, or person acting as such, a clerk or deputy clerk of the peace or justices acting in Quarter Sessions, the question of indemnity should be decided by the Lord Chancellor, who, in appropriate cases, should ask the Treasury Solicitor to make the necessary arrangements for the defence. Where the Lord Chancellor decides that expenses, including costs or damages awarded against the defendant, should be paid out of public funds they should be borne by the Exchequer.
- (9) Justices who are respondents in proceedings in the Divisional Court on a motion for a prerogative order would normally be expected to file an affidavit as provided for in the Review of Justices' Decisions Act, 1872; they are not then liable for any costs. In the exceptional cases where the Divisional Court ask for them to be represented the Treasury Solicitor should arrange for them to be represented if the justices so desire.

28. We should like to record our gratitude to our Secretary, Mr. Priss, whose services in preparing material for the Working Party, and in the drawing up of this report, have been most valuable.

Signed W. T. C. SKYRME (*Chairman*)

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11th October, 1960

APPENDIX

Statutory Provisions for meeting out of public funds expenses incurred by a justice in respect of

(a) *acts done out of Quarter Sessions and*

(b) *acts done in County Quarter Sessions*

(a) *Justices of the Peace Act, 1949, sections 25 and 26*

"25. (1) Subject to the provisions of this Act, the council of each county and of each borough having a separate commission of the peace shall provide the petty sessional court houses and other accommodation, and the furniture, books and other things, proper for the due transaction of the business, and convenient keeping of the records and documents, of the county or borough justices out of sessions, or any committee of such justices, or for enabling the justices' clerk for the county or borough or any part thereof to carry out his duties.

(2) The council of each county and of each borough having a separate commission of the peace shall pay —

- (a) Any expenses of the magistrates' courts committee, or in the case of a committee acting for the area of more than one such council the proper proportion of those expenses; and
- (b) the sums payable under Part III of this Act on account of a person's salary or expenses as justices' clerk for the county or borough or any part thereof and the remuneration of any staff employed by the magistrates' courts committee to assist him, together with any contributions for which the committee may be liable under the National Insurance Acts, 1946, as employer of the clerk or staff; and
- (c) so far as they are not otherwise provided for, all other costs incurred with the general or special authority of the magistrates' courts committee by the county or borough justices out of sessions or by any of the county or borough justices in defending any legal proceedings taken against him in respect of any order made or act done out of sessions in the execution of his duty as such a justice; and
- (d) any costs or damages awarded against any of the county or borough justices in such proceedings as aforesaid in so far as the magistrates' courts committee determine that they ought not to be borne by the justice personally.

(3) Any accommodation provided under this section for any justices or justices' clerk may be outside the area for which the justices act and, in the case of a petty sessional court house, shall be deemed to be in that area for the purpose of the jurisdiction of the justices when acting in the court house.

(4) Two or more councils may arrange for accommodation, furniture, books or other things provided for the purposes of this section by one of them to be used also as if provided for those purposes by the other or each of the others.

(5) Section sixty-six of the Local Government Act, 1888 (which directs certain costs to be paid out of the county fund subject to the sanction of the



standing joint committee of the county council and quarter sessions), shall cease to apply to costs incurred by justices out of sessions or by a justice in defending legal proceedings in respect of an order made or act done out of sessions.

(6) Nothing in this section shall prejudice the power to appoint an occasional court house conferred by section twenty of the Summary Jurisdiction Act, 1879, or the power to appoint a petty sessional court house in the university of Oxford conferred by the Oxford University (Justices) Act, 1886.

26. (1) Subject to the provisions of this section —

- (a) the petty sessional court houses and other accommodation, furniture, books and other things to be provided by a council under the last foregoing section; and
- (b) the salary to be paid to a justices' clerk and the staff to be provided for him; and
- (c) the nature and amount of the expenses which a magistrates' courts committee may incur in the discharge of any functions or may authorise to be incurred (including the sums payable to a justices' clerk in respect of accommodation, staff or equipment provided by him);

shall be such as may from time to time be determined by the magistrates' courts committee after consultation with the council or councils concerned.

(2) Where the expenses of a magistrates' courts committee, or the sums payable to or in respect of a justices' clerk holding more than one clerkship or to or in respect of staff provided for any such clerk, fall to be borne by more than one council, any question as to the manner in which they are to be borne by the councils concerned shall be determined by agreement between those councils.

(3) Any council concerned which is aggrieved by a determination of a magistrates' courts committee under subsection (1) of this section, or under paragraph (d) of subsection (2) of the last foregoing section, may within one month from the receipt by the council of written notice of such determination appeal to the Secretary of State whose decision shall be binding upon the magistrates' courts committee and any council concerned; and any question which by the last foregoing subsection is directed to be determined by agreement shall in default of agreement be determined by the Secretary of State; and the approval of the Secretary of State shall be required for any determination under subsection (1) of this section reducing the salary of a justices' clerk, unless the clerk consents to the reduction."

(b) *Local Government Act, 1888, section 66*

"All costs incurred by the quarter sessions of a county, and all costs incurred by any justice, police officer, or constable, in defending any legal proceedings taken against him in respect of any order made, or act done, in the execution of his duty as such justice, police officer or constable shall, to such amount as may be sanctioned by the standing joint committee of the county council and quarter sessions, and so far as they are not otherwise provided for, be paid out of the county fund of the county, and the council of the county shall provide for such payment accordingly."

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